(2012) 07 AP CK 0104

In the Andhra Pradesh High Court

Case No : Writ Petition No''s. 4060, 4065 and 4204 of 2012

Bharat Heavy Electricals Limited APPELLANT

Vs

Commercial Tax Officer and Another RESPONDENT

Date of Decision : 31-07-2012

Acts Referred:
Andhra Pradesh Value Added Tax Act, 2005 — Section 40

Citation : (2013) 62 VST 325

Hon'ble Judges : M.S. Ramachandra Rao, J;Goda Raghuram, J

Bench : Division Bench

Advocate : G. Narendra Chetty, for the Appellant; P. Balaji Varma, Special Government Pleader for Commercial Tax, for the Respondent

Final Decision : Allowed

Judgement

Goda Raghuram, J.—Heard Sri G. Narendra Chetty, the learned counsel for the petitioner and Sri P. Balaji Varma, the learned Special Government Pleader for Commercial Taxes. The three writ petitions present identical issues for adjudication and therefore considered together and disposed of by this common order.

2. W.P. No. 4060 of 2012 pertains to the assessment year 2009-10; W.P. No. 4065 of 2012 to the assessment year 2008-09; and W.P. No. 4204 of 2012 to the assessment year 2007-08. The facts in W.P. No. 4060 of 2012 are representative of the relevant facts in the other writ petitions as well and are recorded for analysis.

3. The petitioner is a public sector company engaged in erection and commissioning of power plants in several States. As part of its business of erection and commissioning of power plants, the relevant division of the petitioner-company is engaged in purely labour oriented jobs not involving transfer of any material whatsoever to the customer. It pays service tax on its entire receipts. It is a registered dealer under the Andhra Pradesh Value Added

Tax Act, 2005 (for short, "the Act"), on the rolls of the first respondent.

4. During the relevant assessment year, the petitioner executed the work of erection and commissioning of the Rayalaseema Thermal Power Project, Stages II and III in Kadapa District for the Andhra Pradesh Power Generation Corporation (for short, "the APGENCO") in relation to the works of erection, testing and commissioning of the entire plant and equipment, including comprehensive insurance. It filed monthly returns before the assessing authority claiming total exemption and declared a "nil" taxable turnover. The contractee-APGENCO, as per instructions of the respondents, however effected tax deduction at source (TDS) at 2.8 per cent from the bills payable to the petitioner and remitted the same to the Department.

5. Since the turnover of the petitioner-company is not exigible to tax in view of the above circumstances, the petitioner was claiming refund from the Commercial Tax Department. There being no response, the petitioner filed W.P. Nos. 32949, 32951 and 32963 of 2010 for a direction to the respondents to refund the TDS amounts deducted from the bills of the petitioner by the contractee and remitted to the Department. The writ petitions were disposed of by a common order dated December 30, 2010. This court directed the petitioner to place all the material including material called for by the second respondent to support its claim for refund and directed the second respondent to consider refund of the VAT amount deposited by the contractee from the account of the petitioner, within the time stipulated, and to pass appropriate orders determining the amount of refund u/s 38(1)(b) read with section 40 of the Act after affording opportunity of hearing to the petitioner.

6. Consequent on the order of this court above, the petitioner applied to the second respondent for refund duly furnishing the relevant material. The first respondent passed the assessment orders in respect of the assessment years in question, all dated January 31, 2011 assessing the petitioner to "nil" turnover, concluding that the petitioner was engaged in purely labour and service works not involving transfer of any material and enumerated the excess tax payment. The first respondent instead of refunding the tax paid by way of TDS deducted by the contractee however passed an order dated March 8, 2011 forfeiting the TDS collections under rule 18(3)(b) of the Andhra Pradesh Value Added Tax Rules, 2005.

7. Aggrieved thereby the petitioner preferred an appeal to the Appellate Deputy Commissioner, Kurnool. By the order dated October 27, 2011, the Appellate Deputy Commissioner disposed of the petitioner''s appeal clearly concluding that the contract is purely a labour and service contract not involving any transfer of material and no tax liability is attracted on this turnover; that the contractee-APGENCO never added four per cent tax in the schedules as verified from the agreement; and that rule 3(a) and (b) applies only to cases where tax is added separately to the estimated value of the contract; that on perusal of the contracts between the petitioner and the APGENCO there was no inclusion of AP

VAT tax and any other State taxes; and that the TDS deduction made by the contractee and deposited with the Department on the basic value of the price did not include any taxes. The Appellate Deputy Commissioner concluded that since the consideration received by the petitioner is the basic contract value minus the TDS deduction, there was no addition/inclusion of tax to the basic contract amount; and the contractee had not paid any VAT tax in addition to the basic contract price nor the petitioner receive any amount in excess of the liability of the contractee towards the works executed for it by the petitioner, there is also no undue enrichment to the petitioner. However since the first respondent failed to record any findings or set out any discussion (on the objections of the petitioner in response to the show-cause notice except extracting the provisions of section 22(3A) read with rules 3(a)(b) of the 2005 Rules and confirmed the proposals of forfeiture without recording reasons for the same), the Appellate Deputy Commissioner set aside the order of forfeiture dated March 8, 2011 and remanded the matter for disposal de novo.

8. Consequent on the remand, the first respondent passed the impugned order dated January 23, 2012 recording the following reasons and again forfeiting the tax of Rs. 50,89,185, pertaining to the assessment year 2009-10:

The objection of the dealer that contractee is not a Government or local authority is not tenable and has no legal powers as the APGENCO is an undertaking of the State Government indulging in power generation and trading of power distribution. Further the Appellate Deputy Commissioner, Kurnool, while remanding the appeal directed the Commercial Tax Officer to verify the purchase order and found that GENCO never added four per cent tax in the schedule as verified from the agreement. The point to be considered by undersigned as to whether dealers executed the works for Government or local authorities and whether rate of four per cent is added separately to the estimated value of the contractee. In this connection, as per the records available the dealers are not under composition and executed works for AP GENCO, where the tax was collected, in excess of the liability. Even as per the conditions in para 3 of the agreement, all other taxes shall be payable either way against proof of documentary evidence. It means the Department has issued proceedings of forfeiture, the GENCO shall have to pay tax to the dealers. Clearly indicates that the Department should have made provision for reimbursement of tax in the estimates. The sub-rule (3)(b) of rule 18 is applicable to the contractors and tax collected in excess of liability shall be deemed to have been liable by the contractor and shall be liable to be forfeited. This very specific provision exclusively for covering the works contractors. The provisions of section 38(9) read with rule 35(13) came into force from May 1, 2009 only. Therefore, the amount of tax Rs. 50,89,185 collected in excess is hereby forfeited.

9. From the order of the first respondent impugned herein, it is clear that the first respondent disregarded the findings recorded by the Appellate Deputy Commissioner in the order dated October 27, 2011 declaring in substance, the

entitlement of the petitioner to refund of the tax deducted from the amounts due from APGENCO to the petitioner and deposited to the Revenue by way of TDS.

10. Sri Balaji Varma, the learned Special Government Pleader for Commercial Taxes, fairly concedes the position that the impugned order is in clear transgression of the appellate order, dated October 27, 2011 and cannot be sustained. The other writ petitions reveal an identical nature of facts.

11. We are of the considered view in the circumstances that the impugned orders are passed by the first respondent not only in disregard of the order of the Appellate Deputy Commissioner but also in careless exercise of jurisdiction and without due consideration of the findings recorded by the appellate authority vide his order dated October 27, 2011.

12. In the circumstances, the writ petitions are allowed with costs. The impugned orders of the first respondent, all dated January 23, 2012 are quashed and the Revenue-Commercial Tax Department is directed to refund the amount of tax deposited by the APGENCO by way of TDS, deducted from the bills payable by the APGENCO to the petitioner, in respect of the assessment years 2007-08, 2008-09 and 2009-10, within four weeks from the date of receipt of a copy of this order. Costs of Rs. 10,000 (ten thousands) in each of the writ petitions are awarded, payable by the State to the petitioner, also within four weeks from the date of receipt of a copy of this order.

13. The writ petitions are allowed as above with costs as quantified herein. That rule Nisi has been made absolute as above witness the honourable Sri Pinaki Chandra Ghose, the Acting Chief Justice on this Tuesday, the thirty first day of July, two thousand and twelve.